Back to you: judicial deference, Parliament and the right to die

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Back to you: judicial deference, Parliament and the right to die

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The Queen on the application of Philippe George Newby v The Secretary of State for Justice [2019] EWHC 3118 (Admin) Administrative Court

Introduction and background

Whether a person has the 'right to die' and whether domestic law should facilitate such a right, specifically through assisted suicide, has been the subject of continuous legal challenge since the first litigation in 2002.[1] The law on assisted suicide – contained in s.2 of the Suicide Act 1961[2] – has been the subject of a number of unsuccessful challenges before the domestic courts and the European Court of Human Rights.[3] This is on the basis that interference with any Convention or human right is necessary and proportionate, and that it is for Parliament and not the courts to question the current law, contained in both s.2(1) of the Suicide Act 1961 and the common law of murder (which makes euthanasia unlawful). These challenges are made on the basis that the current law operates a blanket ban,[4] but the courts, mindful of their constitutional role in challenging the law; have so far shown determined judicial deference towards Parliament's decision not to change the law in favour of a limited right to die under articles 8 and 14 of the European Convention.

This piece examines the most recent, unsuccessful, litigation in this area – the decision of the High Court in *Newby*.[5] In this case, the applicant, as with others before him, sought a declaration of incompatibility with respect to s.2. However, by way of the illustrating disproportionality of s.2, he submitted to the court a 'scheme' containing several criteria and safeguards by which, he contends, any legitimate aims of s. 2(1) could be preserved without disproportionately infringing his rights. Specifically, he sought to determine the question whether the court should hear evidence on 'the mixed ethical, moral and social policy issues' which have a bearing on the assessment of the proportionality of interference his and others' rights.[6]

As we shall see, the court rejected this specific challenge, feeling that such evidence was more appropriately debated in Parliament than argued in a court of law. Thus, we are back where we started, and must wait for Parliament to change the law. Nevertheless, this piece will use this

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[1] *R (Pretty) v DPP* [2002]] 1 AC 100; *Pretty v United Kingdom* (2000) 35 EHRR 1.

[2] Section 2(1) of the 1961 Act provides that: "A person ("D") commits an offence if- (a) D does an act capable of encouraging or assisting the suicide or attempted suicide of another person, and (b) D's act was intended to encourage or assist suicide or an attempt at suicide.".

[3] See the cases dealt with in the section below: 'The litigation so far.'

[4] See Carmen Draghici 'The blanket ban on assisted suicide: between moral paternalism and utilitarian justice' [2015] 3 EHRLR 286

[5] *The Queen on the application of Philippe George Newby v The Secretary of State for Justice* [2019] EWHC 3118.

[6] That issue could only become justiciable were the court to grant permission for judicial review and direct a hearing of the preliminary issue.

current litigation to revisit the arguments for deference on the one hand and judicial activism on the other.[7]

The litigation so far

Put simply, the argument in favour of declaring the current law as incompatible with the individual's human rights is that it represents an arbitrary and disproportionate interference with the claimant's Convention rights. This is because it fails to distinguish between an able-bodied person (who is capable of lawfully ending their own life) with a disabled person (who is not so capable). On the other hand, the state argues that the 'blanket' ban is necessary to, *inter alia*; protect the rights of others – the life of vulnerable individuals. Merged with these counter arguments, is the added dilemma – who is most suited to decide this conflict: the courts or Parliament. An examination of the litigation preceding *Newby* is, therefore, essential in identifying the jurisprudential framework of both the domestic courts and the European Court of Human Rights in this area.

In *Pretty v United Kingdom*,[8] the first in a series of cases to challenge the compatibility of s.2 of the Suicide Act 1961, the House of Lords held that there had been no violation of the applicant's Convention rights and that the Suicide Act 1961 was not incompatible with Articles 2, 3, 8, 9 or 14 of the European Convention. The European Court dismissed her claim under Article 2, as that Article could not be interpreted as involving a negative right – the right to die.[9] It also dismissed her claim under Article 3, as the government had not, itself, inflicted any ill treatment on the applicant. However, the Court held that the ability to conduct one's life in a manner of one's choosing might also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned. Thus, Article 8 was engaged and required justification in terms of Article 8(2).[10] Nevertheless, the Court found that the interference was necessary in a democratic society for the purpose of safeguarding life and thereby protecting the rights of others within Article 8(2). In particular, the Court found that states were entitled to regulate activities that are detrimental to the life and safety of other individuals, and that it was primarily for the states to assess the risks to the weak and vulnerable as well as the likely incidence of abuse if the general prohibition on assisted suicides were relaxed or exceptions made.[11]

Further, the Court rejected her claim under Article 14. Although it accepted that discrimination under Article 14 might occur where states, without an objective and reasonable justification, failed to treat differently persons whose situations are significantly different,[12] in this case there was objective and reasonable justification for not distinguishing in law between those who are and those who are not physically capable of committing suicide. In the Court's view, building

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[7] See Steve Foster, 'Human rights, judicial activism or deference and the case of assisted suicide' (2019) 24(1) *Coventry Law Journal* 69.

[8] (*R (Pretty)* v *Director of Public Prosecutions* [2002] 1 All ER 1.

[9] *Pretty v United Kingdom* (2002) 35 EHRR 1. In the Court's view, Article 2 was unconcerned with issues to do with the quality of living or what a person chooses to do with his or her life. It could not therefore, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die and a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life.

[10] *Laskey, Jaggard and Brown* v *United Kingdom* (1997) 27 EHRR 39.

[11] Rejecting the claim under Article 9, that the DPP'S refusal constituted an unjustified interference with her freedom of thought and conscience, the Court held that although it did not question the firmness of the applicant's views concerning assisted suicide, it did not consider that all opinions or convictions constitute beliefs as protected by Article 9(1) of the Convention. The applicant's claims did not involve a form or manifestation of a religion or a belief, through worship, teaching, practice or observance within that article 9.

[12] *Thlimmenos* v *Greece* (2001) 31 EHRR 15.

into the law of an exemption for those judged incapable of committing suicide would seriously undermine the protection of life that the 1961 Act was intended to safeguard.

The litigation in *Pretty* thus established the basic principles concerning the use of Convention rights in challenging the law on assisted suicide, but in *Nicklinson v Ministry of Justice*,[13] the UK Supreme Court heard a fresh challenge in this area.[14] The case was brought by a number of individuals who suffered from catastrophic physical disabilities (although their mental processes were unimpaired) and wished to end their lives, and who claimed the Suicide Act was incompatible with articles 8 and 14. The Supreme Court, by a majority of seven to two, dismissed the appeal and held that the question whether the current law on assisted suicide is incompatible with Article 8 lay within the United Kingdom's margin of appreciation, and was therefore a question for the United Kingdom to decide. In the majority's view the 1961 Act did not impose what the European Court would regard as an impermissible 'blanket ban' which would take it outside the margin of appreciation allowed to member states in this area. The refusal of the Supreme Court to grant a declaration of incompatibility resulted in an application to the European Court of Human Rights in *Nicklinson and Lamb v United Kingdom.*[15] The Court declared the application inadmissible, finding that Article 8 did not impose procedural obligations requiring the domestic courts to examine the merits of a challenge brought in respect of primary legislation as in the present case. In the Court's view, States are generally free to determine which of the three branches of government should be responsible for taking policy and legislative decisions that fall within their margin of appreciation.

The post-*Pretty* cases clearly indicate a deferential judicial approach in this area, but after Parliament had decided not to change the law there was a further challenge made in *Conway v Ministry of Justice*. After the Court of Appeal had held that it was appropriate to consider another challenge – Parliament was no longer debating the issue – both the High Court and Court of Appeal considered the substantive challenge and the question of whether to grant a declaration of incompatibility.[16] The *Conway* case raised an issue not specifically addressed by the previous courts. Thus, he proposed before the court an alternative statutory scheme, which would permit assisted suicide, while sufficiently protecting the weak and vulnerable: that assistance had to be authorised by the High Court. This, he argued, would show that the blanket prohibition that was in existence, and which had been supported by the domestic and European courts, was an unnecessary and disproportionate interference with his Article 8 rights.

However, the High Court held that the ban was necessary in order to promote the aim of protecting the weak and vulnerable. Further, any High Court involvement to check capacity and absence of duress, as advocated by the claimant, did not meet that need, as persons with serious debilitating terminal illnesses could feel despair and consider themselves a burden, making them wish for death, even while they retained full capacity and were not subjected to improper pressure by others. There was evidence of a real risk of vulnerable people seeking assistance to die were the s.2 prohibition to be relaxed, and High Court approval would not

[13] [2014] UKSC 38.

[14] For case commentaries on *Nicklinson*, see John Finnis, 'A British ''Convention'' right to assistance in suicides? (2015) 131 LQR 1 and Elizabeth Wicks, 'The Supreme Court judgment in *Nicklinson*: one step forward on assisted dying; two steps back on human rights. [2015] 23 (1) Med. L. Rev. 144.

[15] Decision of the European Court of Human Rights, Application Nos. 2478/15 and 1787/15

[16] By the time the Conway case was brought before the Court, Parliament had already debated and rejected the Assisted Dying (No. 2) Bill, which if passed would have altered the law on assisted dying for those with less than six months to live.

completely safeguard against external pressure. Parliament was better placed than the court to assess the likely impact of changing the law. The decision was upheld by the Court of Appeal, which noted that permitting assisted suicide raised important moral and ethical issues, and that the evidence in the present case did not clearly establish the efficacy of the appellant's proposed scheme. Further, the appellant's scheme and its potential consequences raised wide-ranging policy issues. Parliament was a far better body for determining the difficult policy issues in relation to assisted suicide in view of the conflicting, and highly contested, views within society on the ethical and moral issues and the risks and potential consequences of a change in the law and the implementation of a scheme such as that proposed by the appellant:

Challenging the ban by the use of evidence

Of particular relevance to the present challenge in *Newby*, below, *Conway* had attempted to provide to the court evidence to prove the disproportionality of the ban – in that case that alternative schemes were available and could work in practice to achieve a more balanced law. As we saw, that tactic failed, as the courts were not convinced that the proposed scheme would allay society's fears over any system of assisted suicide. However, a different tactic was employed in the case of *T v Secretary of State of Justice*.[17] In that case, T, a 55 year-old man living in a nursing home, suffered from multiple systems atrophy, a rare and devastating neurological disorder affecting the body's autonomic functions. He sought a declaration of incompatibility with respect to s.2 of the 1961 Act, but unlike previous cases, he sought permission to cross-examine certain witnesses whose evidence has been lodged on behalf of the Secretary of State.

The applicant sought to rely on the decision of *Canada v Charter*,[18] where the Supreme Court of British Columbia, heard oral evidence over a number of weeks from a variety of experts. In this sense, the High Court stressed that that case does not address the fundamental issue that now confronts this Court - whether it would be constitutionally inappropriate for this Court to hear evidence with a view to assessing, for itself, the necessity of the measure. That constitutional issue, according to the court, is whether it is appropriate for the court to hear primary evidence on issues of policy, in the context of a challenge to the proportionality of s.2 of the Act, or whether that this is something that only Parliament should appropriately do. In a subsequent hearing, the court ruled as a preliminary issue that it was not appropriate or necessary to cross-examine or hear first-hand evidence from one of the Ministry of Justice's expert witnesses. In the court's view the factual foundations for the views of the various experts were either already clear, or could be clarified in submissions from counsel based on written material before the court.

Of course, the motive behind these requests is to cast doubts on the legitimacy, and then the proportionality and necessity of the state's reasons for maintaining the ban, and thus to strengthen the claims that the current ban is disproportionate, and would benefit from reform. The claim in *Newby* as we shall see goes further than the request made, and rejected, in *T*, and is essential to the success of any request to the courts to declare s.2 incompatible.

The facts and decision in *Newby*

Philippe Newby is 49 year-old man who was diagnosed with motor neurone disease in May 2014. In his statement to the court he noted that he was no longer able to dress or undress

[17] [2017] EWHC 3181 (Admin).
[18] [2015] SCC 5.

himself, to wash or conduct personal hygiene or care, to scratch an itch, hold a pen, type, hold, lift open, or pull an object with a hand, use a knife, or make or open food or liquid refreshments for himself. Further, he can no longer walk, move beyond two rooms in his home without assistance, leave his home or travel without assistance. He cannot use a normal toilet (including normal disabled toilets), drive, or turn over in bed. According to the statement, with each month, the array of things that he can do diminishes. Although he is generally stable, his emotional state varies a little, and in the winter of 2018, driven by the prospect of being trapped in his body without the agency to bring his life to an end, he considered taking his own life. In January 2019, he, together with his wife Charlotte, resolved to fight through the courts for the right to end his life at a time when he believed he 'had run out of road - and not before'.

Under these circumstances, the claimant brought a renewed application for judicial review, permission having been initially refused by Whipple J on 27 September 2019.[19] The claimant ultimately seeks a declaration of incompatibility under section 4(2) of the Human Rights Act 1998, stating that the current law on assisted suicide contained in s.2(1) Suicide Act 1961 (as amended by the Coroners' and Justice Act 2009 is incompatible with Articles 2 and 8 of the European Convention on Human Rights. The claimant argues that s.2(1) breaches his Convention rights as it will operate to prevent him from obtaining assistance to end his life, even where proper safeguards exist. Further, the fact that the prohibition in s.2(1) is a blanket prohibition, admitting of no exceptions, renders the infringement his Convention rights disproportionate. Specifically, the claimant sought to illustrate such disproportionality by submitting a scheme' containing several criteria and safeguards by which, he contends, any legitimate aims of s.2(1) can be preserved without disproportionate infringement of his rights. Thus, the specific point which he seeks to have determined as a preliminary issue is whether the court should hear evidence of what he terms "legislative facts" - a term deployed as short-hand for 'the mixed ethical, moral and social policy issues' which have a bearing on the assessment of the proportionality of interference with the his Article 8 rights.[20]

Acting on behalf of the claimant, Mr Bowen submitted that the present case provides the court with an opportunity properly to resolve the proportionality issue by reference to primary evidence, which was not available in *Nicklinson* and other cases. Further, it was argued that the decision in *Conway* should be distinguished and is therefore not binding on this court, as the position of the respective claimants is materially different: whilst in *Conway* the claimant's prognosis left him with less than six months to live, Mr Newby's life expectancy is longer. Additionally, Mr Newby, unlike Mr Conway, is not receiving non-invasive ventilation, and therefore cannot request the legal withdrawal of this treatment. Consequently, it is argued that Mr Newby has fewer legal options available to him to end his life on his terms. Further, whilst the current application seeks to examine and resolve the underlying 'legislative facts' that purport to justify the blanket ban on assisted suicide no such attempt was made in *Conway.*[21] Finally, it is argued that the two cases are distinct, given that it is presently argued that s.2(1) violates the Claimant's Article 2 rights, as well as his Article 8 rights, the former right not being argued in *Conway*. Thus, in this case it is argued that Article 2 is engaged because the present law may drive Mr Newby to take his life earlier, since he cannot rely on assistance later.

The decision in Newby and the nature and justifiability of the evidence

[19] [2019] EWHC.

[20] It was accepted by the court that that issue could only become justiciable were the court to grant permission for judicial review and direct a hearing of the preliminary issue.

[21] According to the court in Newby, the term "legislative facts" had been plucked from the Canadian case of *Carter v AG of Canada* [2015] SCC5 and referred to the "mixed ethical, moral and social policy issues" which go to the test that courts must apply in determining the compatibility of s.2(1) under section 4 of the HRA.

In the court's view, the term "legislative facts" – the presentational centrepiece of the claimant's argument - was plucked from the Canadian case of *Carter v AG of Canada,*[22] and refers to the "mixed ethical, moral and social policy issues" which go to the test that courts must apply in determining the compatibility of s.2(1) under section 4 of the HRA. These "facts" in the court's opinion are pieces of information or evidence, which the claimant asserts are necessary in order to undertake a proper analysis of whether the current legal regime interferes with Mr Newby's rights, and whether this interference can be justified on the ground of proportionality. Thus, it was argued that in order for the court to be enabled to embark upon a meaningful assessment of whether the interference with Article 8 can be justified under Article 8(2), the court must examine fully the information concerning the validity of the costs, risks, and benefits of regulating assisted suicide. Thus, by inference it was argued that ignorance of this evidence inhibited the court from making a proper assessment of whether the current law is proportionate to its legitimate aim. These categories of costs, risks, and benefits were then summarised as follows:

'What is the degree of harm caused by the absolute ban in Section 2(1) Suicide Act to the autonomy, physical and psychological integrity of persons, like C, who suffer from incurable or terminal conditions that cannot be palliated, and who are physically unable to end, and prevented by Section 2(1) from obtaining assistance in ending their lives at a time and in the manner of their choosing?'

More specifically, the court considered:

- Whether vulnerable people are more or less at risk of premature death in a permissive or prohibitive jurisdiction (like the UK).
- The number of people who are affected by the current law and who are likely to be affected by any change in the law.
- Whether there is any causative link between the availability of palliative care and a jurisdiction being more permissive or prohibitive.
- Whether a more permissive approach is likely to have a negative impact on doctor-patient relationships and public trust in the public health system.
- Whether a more permissive approach is likely to have a negative impact upon the ethnical principle of the sanctity of life, with particular emphasis on the ethical distinctions between end of life practices that are currently lawful and those that are unlawful.
- Whether a more permissive approach is likely to have a beneficial effect of improved openness in end-of-life discussions in permissive jurisdictions and how this may contribute in a positive way to the patient's experience of dying.
- Whether a more permissive approach is likely to have a beneficial effect of improved regulation and transparency of all end of life decision-making.
- The nature and reliability of the safeguards proposed by C and whether these would meet the risks outlined in above with particular reference to the operation of the safeguards in jurisdictions where assisted suicide is lawful and empirical evidence as to whether and to what extent those risks eventuate in those jurisdictions.

[22] [2015] SCC 5.

In response, the defendant argued that the claim is unarguable, being an attempt to re-litigate issues concerning the prohibition on assisted suicide which have been repeatedly considered and rejected by the courts, most recently in *Conway*. In that case, it was noted that the evidence before it was conflicting, and the defendant argues, nothing has changed since the determination of the Court of Appeal in *Conway* that Parliament is the most appropriate forum for the resolution of these ethical and moral issues.

Relationship between the court and the legislature

With respect to the role of the courts with respect to incompatibility, the court noted that Parliament had given the court the right to declare incompatibility. Thus, the courts cannot simply abdicate responsibility by stating that it is wrong in principle to exclude issuing such declarations on the basis that Parliament is the correct forum in all difficult cases. However, as the Court of Appeal observed in *Conway*:

> ”Weighing the views of Parliament heavily in the balance in a case such as the present one is not the same as a complete abdication of responsibility to consider the merits of the arguments on either side in relation to Article 8(2)’ [23]

Thus, in the present court’s view, in the context of repeated and recent parliamentary debate, where there is an absence of significant change in societal attitude expressed through Parliament, and where the courts lack legitimacy and expertise on moral (as opposed to legal) questions, the courts are not the venue for arguments which have failed to convince Parliament.

Specifically, the court found that even if there was very widespread examination of evidence in these proceedings, the court process was unlikely to provide reliable answers so as to determine this issue. Considerations of morality, upon which the issue turns, are simply not reducible to statistical analysis or any hard-edged, measurable or quantitative conclusions. In the court’s view, the limitations of an evidence-based approach are connected to the constitutional relationship between the judiciary and the legislature, and their respective expertise and responsibilities:

> ‘The number of vulnerable people who may be exposed to the risks of abuse of an assisted suicide system might be clarified by evidence and cross examination. To that extent, some of the evidential premises for a judgement as to the proportionality of the measure in its relation to a legitimate aim justifying interference with individual rights could be assessed. But this is merely a preliminary step. How is a court positioned to conclude whether such an estimated level of abuse to the vulnerable is, or is not, proportionate, as a balance to the enfranchisement of assisted suicide benefitting those facing such a tragic quandary as that before the Claimant? In our judgment, there are some questions which, plainly and simply, cannot be ‘resolved’ by a court as no objective, single, correct answer can be said to exist. On issues such as the sanctity of life there is no consensus to be gleaned from evidence. The private views of judges on such moral and political questions are irrelevant, and spring from no identifiable legal principle. We struggle to see why any public conclusion judges might reach on matters beyond the resolution of evidence should carry more weight than those of any other adult citizen.’

[23] *Conway v Ministry of Justice* [2018] EWCA Civ. [193].

> In cases where a margin of appreciation exists, it is clear this is ceded as a whole to the relevant state and the three branches of the state. That does not determine the relative roles of the three branches of the state. Although "there is no principle by which [such an issue] is automatically appropriated by the legislative branch" this does not change the fact that by reason of Parliament's composition, expertise, procedures, democratic accountability (and hence legitimacy), Parliament is the appropriate forum to consider and determine the very difficult balance between sanctity of life and personal autonomy raised in cases of assisted suicide.'

The court then considered arguments based on two recent cases from Northern Ireland concerning the compatibility with Article 8 of the criminal law on abortion,[24] which might be thought to have a bearing on the relationship between the courts and the legislature in a comparable field involving moral and ethical questions. However, the court in the present case noted that the Court of Appeal in *Conway* considered the implications of the Supreme Court judgment, but concluded that there was nothing in that case to cause a change of mind in relation to the issues raised by Mr Conway. The decision of the Supreme Court in the Northern Ireland case confirmed that there is no institutional bar to determining difficult questions of compatibility but emphasised that the breadth of the area of judgement accorded to Parliament will vary according to the issues raised by a particular case. The court noted that the Court of Appeal in *Conway* highlighted a number of differences between the issues arising in the context of the abortion case in Northern Ireland and that of assisted dying. However, in the present court's view, the decisions on abortion, although serving as a useful illustration of the type of case where courts may properly assess that the balance of proportionality falls in favour of a grant of incompatibility, cannot assist with, still less be determinative of, the issues arising in connection with assisted suicide.

The court thus concluded that despite minor distinctions to be made in the conditions of the claimants, *Conway* was authoritative for present purposes and binding on the present court in relation to this issue. Further, although *Conway* did not specifically consider Article 2, the claimant's reliance on Article 2 cannot provide him with an additional claim having reasonable prospects of success in these proceedings. In *Pretty* , both the House of Lords and the European Court of Human Rights rejected claims that a law prohibiting assisted suicide breaches Article 2 - essentially for the reason that suicide (whether assisted or otherwise) represents the polar opposite of the interest in the sanctity of life which Article 2 exists to protect. However, even if Article 2 were properly to be invoked here, the considerations which would need to be taken into account in any balancing exercise are the same as those applicable to Article 8. Thus, a case formulated under Article 2 adds nothing and must fail for the same reasons as the claim under Article 8. The court is not an appropriate forum for the discussion of the sanctity of life, or for resolution of such matters that go beyond analysis of evidence or judgment governed by legal principle, and the application must fail.

Analysis

The decision in *Newby* follows the approach adopted in *Conway*, and the cases that preceded that litigation. Those decisions clearly indicate that the courts (both domestic and the European Court of Human Rights) are prepared to leave any reform in this area to Parliament, and that it is Parliament, not the courts, who should act as the final arbiter on whether the existing law should be changed, and if so the direction of that reform. In that sense, it was unsurprising that

[24] The judgment of Keegan J in *R (Ewart*) [2019] NIQB 88, and the decision of the Supreme Court in *Northern Ireland Human Rights Commission's Application for Judicial Review* [2018] UKSC 27.

the High Court in *Newby* refused to overturn a strong line of authority by allowing *Newby's* claim, and thus agreeing to consider and balance the evidence offered by the claimants. The questions that the Supreme Court had to address in *Nicklinson* - and which were addressed in *Conway* and the present case, concern both the constitutional and legal relationship between Parliament and the courts together with the role of ethics, morals and public policy in the resolution of legal disputes.

With respect to the first factor, the domestic courts have certainly shown a reluctance to interfere where laws have been *passed* after a long parliamentary and public debate. Thus, in the fox-hunting litigation – *R (Countryside Alliance) v A-G* [25] - the House of Lords felt that it would be wrong if the claimants were to succeed in the courts (in challenging the compatibility of the Hunting Act 2004), having lost their battle in both public and parliamentary debates. This decision was not cited in the *Newby* case, and unlike the above case, the courts were not dealing with the compatibility of legislation that had already been passed by Parliament. Rather, the question was whether the courts should rule on compatibility of existing law where Parliament has decided not to reform that law. Nonetheless, it could be argued that allowing the court to accept and consider such expert evidence in judging the compatibility of s.2 of the Suicide Act might have usurped the role of Parliament to a much greater extent than making a bare declaration of incompatibility, which was sought in *Pretty* and *Nicklinson.* That is because the court would have to consider and weigh such evidence in deciding the current compatibility of the law; a task, many would argue is better performed by Parliament

A related dilemma for the court in such cases is that by accepting such evidence, and rejecting or accepting it in deciding whether, or not, to make a declaration, the courts are in effect making a legislative decision as to what the law should look like if indeed it was changed. Of course, a declaration of incompatibility does not change the law, and Parliament does not have to accept the court's order (or its rationale for giving a declaration. However, courts may be reluctant to give declarations, or in this case to weigh evidence, if what is needed is more specific debate and proposals from Parliament. Thus in *Chester v Ministry of Justice*,[26] the Supreme Court refused to grant a declaration of incompatibility with respect to legislation prohibiting prisoners from voting, [27] because it was up to Parliament to decide what changes were necessary to that law, and what prisoners should receive enfranchisement. Thus, it could be argued in the present case that the shape of any future law on assisted is for Parliament to decide, not the courts, and that allowing the court to rule on expert evidence would force them into decisions best made by Parliament.

That reasoning, however, does not appear to reflect the courts' reluctance to interfere in this area. The courts – in *Conway* and by a majority, in *Nicklinson* – have already ruled that it is appropriate for the courts to decide on incompatibility. Instead, it is the fact that the case raises moral, social and ethical issues (and that the European Court of Human Rights has given its blessing to the current law in the sense that it falls within the state's margin of appreciation), that has led the courts to back down and show judicial deference. We return, therefore, to the fundamental question of whether it is Parliament, rather than the courts, who should decide on

[25] [2009] 3 WLR 392.
[26] [2013] UKSC 63.
[27] Section 3, Representation of the Peoples Act 1983.

compatibility in this area. Thus far, only Lady Hale, in *Nicklinson*, has been prepared to find the law substantively incompatible with Convention rights, her Ladyship feeling that the current law was both discriminatory and disproportionate, and that despite the appearance of a legitimate aim, its pernicious effects on disabled people could not be justified under human rights law. The other Justices and judges believed that the law was compatible and clearly within the European Court's ruling in *Pretty* and the margin of appreciation afforded to Member States in this area. On that basis, the courts might feel it futile (and constitutionally improper) to consider evidence which suggests that the current law is unnecessary or disproportionate.

The decision of the Supreme Court in *Nicklinson*, and the subsequent substantive rulings in *Conway* and *Newby*, thus preserve the status quo, both in national and international law. Thus, despite the majority view in *Nicklinson* that the courts do possess the institutional ability to declare legislation incompatible with Convention rights, the Supreme Court warned against doing so where that would impinge on the role of Parliament in providing a solution to a problem beset with social and ethical issues. That view has been followed since, despite the efforts of subsequent applicants to present alternative schemes to the courts in an effort to persuade them to declare the existing law incompatible.

Yet, despite the clear and consistent case law in this area, there are other instances where the courts have been willing to interfere with issues that many would regard as best decided outside the courts. The recent decision of the Supreme Court on the purported prorogation of Parliament is obviously an example,[28] but there are other instances where the courts have refused to take a deferential approach. Thus, in *A v Secretary of State for the Home Department*,[29] the House of Lord declared anti-terrorism measures in breach of Article 5 and 15 of the European Convention, despite strong criticism that it should have left the final decision to Parliament and the government on the proportionality and necessity of its measures. Again, recently, the Supreme Court have ruled on the compatibility of civil partnership and abortion laws, despite arguments that they should have waited for legislative change.[30] In the present case, the court felt that the two recent Supreme Court decisions were not helpful to the applicants, without really articulating why.

Conclusions

The issue of assisted suicide continues to attract a variety of moral and ethical opinion, as well as arguments in favour of judicial deference on the one hand, and judicial activism on the other.

Despite the arguments in favour of judicial activism and human right and dignity, it appears that a number of factors are combining to justify the courts' approach in this specific area. One is that the case raises delicate moral, social, ethical and other issues, although the same could certainly be said of anti-terrorism measures and the law on abortion and civil partnerships. Secondly, unlike the other issues, above, approaches to and laws on assisted suicide do not

[28] *R (Miller) v Prime Minister* [2019] UKSC 41.
[29] [2005] 2 AC 68.
[30] See, respectively, *Northern Ireland Human Rights Commission's Application for Judicial Review, Re* [2018] UKSC 27; [2019] 1 All E.R. 173; [2018] 6 WLUK 93 (SC (NI)) and *R. (on the application of Steinfeld) v Secretary of State for International Development* [2018] UKSC 32; [2018] 3 W.L.R. 415; [2018] 6 WLUK 546.

show a common European standard or consensus, or have not received the disapproval or indeed questioning of the European Court of Human Rights. Thus, as long as the European Court continues to find such laws compatible, or at least within the state's margin of appreciation, the domestic courts will be reluctant to question these laws and their compatibility with Convention (or domestic) rights. Thirdly, it is clear that the domestic courts are reluctant to question the current law and its rationale where Parliament has already debated the issues and then failed, consistently, to legislate. Despite the courts regarding the issue as one where it would be constitutionally appropriate to entertain a claim on compatibility, the latest case makes it clear that the evidence for and against retaining the current law is best put before Parliament and not the courts. [31]

This three-pronged justification in favour of judicial deference and against judicial activism is therefore currently insurmountable, and the claimants in these cases must rely on future parliamentary intervention. Although such intervention, or the lack of it, is not dependent on political strategy, as was, and indeed is, the issue of prisoners' voting rights, that is scant comfort for the victims of the current law. For those individuals, their efforts to question a law that fails to distinguish between the able-bodied and the disabled - and to provide tangible evidence of its disproportionality - will it seems continue to fail.

[31] At the time of writing, it was reported that Paul Lamb (one of the unsuccessful applicants in the *Nicklinson* litigation) had failed to get permission for judicial review to challenge s.2 of the 1967 Act. His claim was on the basis that it contravened his rights under Articles 3, 8 and 14 of the Convention: Henry MacDonald, 'Right-to-die campaigner fails to overturn ban in court' *The Guardian*, 19 December 2019. Lord Justice Dingemans and Mrs Justice Laing ruled that Lamb's case was "unarguable" and should not be allowed to proceed to a full hearing. The Court noted that allowing exemptions to the law on assisted dying in Lamb's case would remove protection of very vulnerable people, some of whom would not wish to end their lives but may be subjected to pressure to do so.